IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1964.

No. 13

UNITED STATES OF AMERICA,
Petitioner,

vs.

JACKIE HAMILTON GAINEY and CLEVELAND JOHNS,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENTS

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BRIEF FOR THE RESPONDENTS

Subsequent to the entry of judgment in the court below respondent Roy Lee Barrett died. Respondent Cleveland Johns elected to commence the service of his sentence immediately following his conviction and has now been released on parole. Consequently, we respectfully request the case proceed only in the names of Jackie Hamilton Gainey and Cleveland Johns as respondents.

Respondents accept the portions of the petitioner's brief citing the opinion below, the jurisdictional statement, the question presented, the statutes involved and the statement of the case. Such present the relevant matters before this Court for the determination of the question presented.

Argument and Authorities

Sections 5601(b)(1) and 5601(b)(2) are unconstitutional in that there is no rational or reasonable connection between the fact proved, i.e. presence and the facts presumed i.e. possession, custody or control on the one hand and carrying on the business of a distiller on the other.

The rule we believe applicable in determining the validity of these two statutory presumptions is easily stated but difficult of application. In substance, it is that there must be a rational or reasonable connection between the fact proved and the fact presumed. *Tot* v. *United States*, 319 US 463. What constitutes such gives rise to the difficulty. Where the inference is so strained as to not have a reasonable relation to the circumstances of life as we know them, it is not competent for Congress to create such as a rule governing procedure in court. As the court below pointed out, under *Tot* it is not enough that the fact proved be relevant to the ultimate fact presumed. The fact proved must also carry an inference of the fact presumed.

We note from petitioner's brief (page 8) that it approaches this problem on the theory of expanding or enlarging upon the meaning of the statutory provisions outlining the offense of carrying on the business of a distiller without having given bond. See Sec. 5601(a)(4). Further, petitioner agrees that if each of the crimes charged covers only the narrow range of conduct supposed by the court below, then the statutory presumptions "may well be unconstitutional because the facts required to be proved may not rationally support the inference that the respondents in fact engaged in such activities." It takes the position that Sec. 5601(a)(4) covers the activities of any person at all *likely* to be present at the site of an operable

still. Respondents cannot accept this interpretation of Sec. 5601(a)(4) for the simple reason that if such is a correct interpretation, then there would be little or no need for Congress to descend to the particulars that it has in proscribing as criminal practically every phase of the process of distilling illicit whiskey. As pointed out by the petitioner, there are some eleven separate and distinct criminal offenses covering such an operation.

Nor does it help petitioner to attempt to uphold the validity of the presumption relating to carrying on the business of a distiller on the theory that respondents might have been accessories or aiders and abettors in the criminal enterprise. As we view the evidence, they were either principals or not. We think it a fair statement that the evidence does not reveal any acts or conduct on their part tending to type them as aiders or abettors to others insofar as this operation was concerned. The aiding and abetting statute simply provides for the conviction of one for an offense when he knowingly and purposefully aids or abets in the commission of that particular offense. Judge Learned Hand in *United States* v. *Peoni*, 100 F2d 401, at page 402, defines the meaning of aiding and abetting, concluding that the words used in the statute carry an implication of purposive attitude and that the definitions have nothing to do with the probability that the forbidden result would follow upon the accessory's conduct. Actually, whether respondents were principals or accessories is immaterial inasmuch as the government still has the burden of proving them guilty of the particular offense for which they were charged beyond a reasonable doubt, and this includes the proof of each of the particular elements of each offense.

At the outset, therefore, it would seem appropriate to discuss whether or not this Court can, as has been suggested by petitioner, enlarge, expand or redefine what con-

stitutes the possession, custody or control of an illicit distilling apparatus or what constitutes carrying on the business of a distiller. In this connection, it is significant to note that Congress, in passing the presumption statutes that we are dealing with, was concerned with overruling *Bozza* v. *United States*, 330 US 160.

Admittedly the presumption statutes here involved were passed by Congress in an effort to facilitate the prosecution of those apprehended at or near the scene of illicit distilling operations. Such had been rendered difficult if not impossible in some instances under the ruling of this Court in *Bozza*. It is interesting, however, to note that Congress did not see fit to redefine in any manner the substantive offenses relating to the possession of an illicit distilling apparatus or engaging in the business of a distiller with intent to defraud the United States of taxes. Instead, Congress attempted to solve the problem of prosecution in these cases by in effect presuming the defendant to be guilty by virtue of his mere presence, thereby casting the burden upon him of coming forward with some satisfactory evidentiary explanation of his presence. Such indeed "gives short shrift to the constitutional privilege" as indicated in the court below.

We recognise that this Court must give weight to the legislative judgment that the presumptions here involved are reasonable. It must ascertain whether it is reasonable for Congress to find it is reasonable for a jury to find the presumed fact beyond a reasonable doubt. We must look to the legislative history of the statutes in order to determine whether Congress was acting upon knowledge not otherwise available to the courts. The legislative history of these statutes does not offer any evidence that Congress had found that experience showed a sufficient rational connection between presence at an illicit still and possession

or carrying on the business of a distiller without having given bond. Instead, we find that its specific purpose was to overrule that part of *Bozza* in which this Court had held in effect that presence at a still was insufficient for conviction of possession.

The burden is always upon the prosecution as it should be to prove guilt beyond a reasonable doubt. Therefore, we see that the presumptions are an attempt on the part of Congress to circumvent the prior holding of this Court and those of the appellate courts, particularly, those within the Fifth Circuit wherein a good many decisions have been entered dealing with the insufficiency of mere presence at the scene of an illicit distillery. However, in order to convict of the various crimes contained in Sec. 5601 of the Internal Revenue Code of 1954, it requires now as it did in 1947 or 1958, that the prosecution prove its case beyond a reasonable doubt including proof of the essential elements necessary to constitute each of these crimes.

It is not clear whether or not the presumption statutes have been interpreted by the court below as shifting the burden of going forward with credible evidence. The words of the statute "to the satisfaction of the jury" seem to imply that the burden has shifted to the defendant so that he must persuade the jury by preponderance of the evidence that the presumed fact is false. Further, those words indicate that the trial judge is prohibited from dismissing the presumption even after rebutting evidence had been introduced since such must be explained to the satisfaction of the jury. We have, therefore, an increased burden cast on a defendant under this interpretation if such be correct. That increased burden requires a stricter test of reasonableness or rationality to uphold the validity of the presumptions.

The major difficulty in upholding the inference of "possession" and "carrying on" the business of a distiller from proof of mere presence is that the process or activity of illicit distilling has been broken down into so many different —yet closely related—crimes that it is impossible to say that mere presence necessarily means possession in the highly technical sense of dominion or control or either the carrying on of the business of a distiller. These presumptions, if valid, are sufficient alone to establish the ultimate issue of guilt. Therefore, this Court must test their validity by asking whether a reasonable jury could find beyond a reasonable doubt that the presumed fact is true if the basic fact is true. Such cannot be done without a strained inference.

Again, we are brought back to the relationship of mere presence to that of possession and carrying on the business of a distiller. If it could be likely these respondents were at the scene of this illicit distillery for any other unlawful purpose than that of possessing the still or carrying on the business of a distiller, then we cannot say that the proof of presence necessarily carries an inference solely of either possession or carrying on the business of a distiller. To meet the test prescribed by *Tot*, whether it is termed a rational connection or one of reasonableness, the reasonable probabilities of presence for other unlawful conduct must necessarily be excluded. One might say that these respondents were at this location for either one of eleven illegal purposes. That being true, Justice Holmes' comment in *McFarland* v. *American Sugar Refining Company*, 241 US 79, that "it is not within the province of a legislature to declare an individual guilty or presumptively guilty of a crime" indeed has much meaning.

The petitioner in its brief seems to say that just because respondents were at the site, they should be deemed to be

presumptively guilty of something because there are so many crimes related to the business of moonshining. Such is not our understanding of the law. We are not here concerned with any of the other offenses under the Internal Revenue Laws relating to illicit whiskey inasmuch as respondents were indicted, tried and convicted (so far as we are here concerned) on only two of those statutes, namely, possession of the still and carrying on the business of a distiller without bond as required by law.

The possession we are talking about with respect to the first presumption is a highly technical legal concept of dominion and control, *McFarland* v. *United States*, 5 Cir., 273 F2d 417. It is, indeed, far different from the possession that we have in mind when we are concerned with, for instance, possession of recently stolen property or possession of marijuana. That type possession denotes an actual physical possession, the mere proof of which can reasonably lead to the inference that it is a guilty possession. As was pointed out in the court below there is a rational connection between the possession of recently stolen property and the theft of the property. *Yielding* v. *United States*, 5 Cir., 173 F2d 46. Even such, however, requires the additional proof of theft before the presumption comes into effect.

We state briefly and unequivocally that a very marked distinction exists between mere presence at the site of an illicit still and the physical possession of marijuana, the possession of which is unlawful. The presumption relating to such has been sustained by this Court as it is readily seen, that once the *possession*, in fact, has been proven, it is reasonable to infer that such is a guilty possession by virtue of the nature of the article possessed and the statutory prohibition against such possession. Possession of such is not consistent with innocence. However, mere presence with-

out more, at the scene of an illicit distillery is in and of itself consistent with the hypothesis of innocence. It can be a guilty presence or an innocent presence. Therefore, it is not reasonable to draw an inference of unlawful possession from such presence to the degree sufficient to sustain a conviction of the technical aspects of having possession, custody or control of a still or distilling apparatus.

It was decided in *Bozza* that the elements necessary to prove possession were different from those necessary to show one carrying on the business of a distiller. Therefore, if the elements are different, how can the proof of mere presence on the one hand give rise to the inference of guilty possession and at the same time give rise to the inference of an unlawful carrying on of the distilling business? The step must be logical. If the step can lead in two different directions, it seems illogical. We submit that the attempt of Congress to overrule *Bozza* is lacking in rationality and reasonableness.

The petitioner in its brief seemingly attempts to justify these statutory presumptions on the ground that in the exceptional cases justice can be done. We do not agree that a percentage rule insofar as due process to an accused is concerned is proper. It is no justification that "out of every hundred persons ever 'present' when an illicit still is being operated, no more than one would be a stranger to the enterprise". (Pet. brief, page 28.) In determining the validity of these two presumptions we must concern ourselves with that "on ·" whether he be a stranger to the enterprise or not.

It is interesting to note from the recent Fifth Circuit case of *Brown* v. *United States*, 317 F2d 521 (1963) that the court more or less assumed that its prior holdings in "presence" cases such as *Fowler* v. *United States*, 234 F2d 697, and *Vick* v. *United States*, 216 F2d 228, had been overruled

by Sec. 5601(b). However, no attack on the constitutionality of the presumptions was there made. It is suggested that such "presence" cases still have precedent effect to the extent of showing the judicial view that presence alone leaves a lot to be proven either as to possession or carrying on the business whether the statutory presumption exists or not. Such is especially true where there is an absence of circumstantial evidence that would tend to show guilt of the particular offense charged. Mere presence does not provide the springboard from which a reasonable inference of either guilty possession or guilty conduct of the business can be drawn.

We suggest that no citations of authority are necessary for the proposition that if an inference can be drawn from a given situation equally as consistent with innocence as with guilt, it cannot be said that reasonable men would in all likelihood, based upon human experience, necessarily draw the inference consistent with guilt as opposed to that consistent with innocence. However, whether or not it is unlikely that an innocent person would simply happen to stumble upon such a still, presence, without more, does nothing to remove the substantial possibility that the defendant is at the still site for the purpose of engaging in illegal activities other than possession or to carry on the business. Presence appears to be just as relevant in proving any of the enumerated offenses as it is for the two dealt with here.

While convenience to the prosecution may have caused Congress to create the inference, convictions could be accomplished in ways other than in shifting the burden of explanation to the defendant. For instance, it is not necessary for revenue agents to make their arrest as soon as a person reaches a still site. In this connection, petitioner treats the presumption here involved as being of a rebuttable permissive type. While that may be true, never-

theless, the practical effect upon a defendant being confronted with a charge on these presumptions must be considered. One can imagine the effect on the jury in a case such as this when they are charged that while they may consider all the facts and circumstances in reaching their verdict, nevertheless, if they find that the defendants were *present* at the site of the illicit distillery, such as a matter of law, will be sufficient evidence to convict them of possessing the still and carrying on the business of a distiller.

Much has been said by petitioner of the nature and manner of the business of producing illicit whiskey. While it may be true as has been pointed out that such, at least in this area, is done primarily in the rural and secluded spots, the presumptions here dealt with go a long way in presumptively determining an accused guilty for "being there".

We respectfully submit in summary that much has been learned from *Yee Hem* v. *United States*, 268 U. S. 178, and *Tot, supra*. As the Ninth Circuit pointed out in *Erwing* v. *United States*, 323 F2d 674, at page 682:

> "From the teachings of Yee Hem and Tot, supra, we learn: that the due process clauses of the Fifth and Fourteenth Amendments set limits upon the power of Congress to make the proof of one fact or group of facts evidence of the existence of the ultimate fact upon which guilt is predicated; that a statutory presumption cannot be sustained if there is no rational connection between the fact proved and the ultimate fact presumed, if the inference of the one from proof of the other is arbitrary because of lack of connection between the two in common experience; that where the inference is so strained as not to have a reasonable relation to the circumstances of life as we know them, it is not competent for the legislature to create it as a rule governing the procedures of courts; and

that the comparative convenience of producing evidence of the ultimate fact is but a corollary to the requirement that there be a rational connection between the facts proved and the facts presumed."

The solution to the prosecution dilemma lies, not in this Court taking a critical look at *Bozza* or in upholding these presumptions at the risk of doing violence to the due process requirements. Instead, a slight restraint, self imposed, on law enforcement officers when they have their victims in sight would do much towards obtaining not only direct evidence of participation in criminal activity but also circumstantial evidence that would speak convincingly of guilt absent any presumption.

Too many possibilities exist by virtue of mere presence —legal and illegal—to justify the presumption of guilt simply therefrom.

Conclusion

For the foregoing reasons it is respectfully submitted that the judgment of the Court of Appeals reversing respondent's convictions on Counts 1 and 2 should be affirmed.

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